Supreme Court, U.S.
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No. 031717

IN THE

Supreme Court of the United States

BRODERICK JONES,

Petitioner,

v.

REGINALD WILEY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a cause of action to recover damages for an arrest allegedly made in violation of the Fourth Amendment accrues, and the applicable statute of limitations begins to run, when the allegedly unconstitutional arrest occurs, or only when criminal proceedings arising from that arrest have been terminated in a manner favorable to the accused.

PARTIES TO THE PROCEEDING

The petitioner is Officer Broderick Jones of the Chicago Police Department. The respondent is Reginald Wiley. The City of Chicago was a party to the proceedings below, but this petition raises no issue relating to the judgment with respect to the City.

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PETITION FOR A WRIT OF CERTIORARI

Officer Broderick Jones of the Chicago Police Department respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra* at 1a-6a) is reported at 361 F.3d 994 (7th Cir. 2004). The pertinent opinions of the district court (App., *infra* at 8a-16a) are unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 22, 2004. A timely petition for rehearing was denied on April 16, 2004. The

jurisdiction of this Court rests upon 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Section 1 of the Civil Rights Act of 1871, as amended, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (2000).

STATEMENT

On August 26, 2002, respondent Reginald Wiley filed suit against Officer Jones and the City of Chicago alleging a deprivation of his rights under federal law and seeking redress under 42 U.S.C. § 1983 (2000). R. 1. The complaint alleged that on January 9, 2000, Officer Jones planted drugs on respondent and then arrested him on false charges. *Id.* ¶ 5. The complaint also alleged that respondent was required to appear repeatedly in court to answer the charges against him until they were dropped on July 8, 2002. *Id.* ¶ 7. The

complaint sought relief for an allegedly false arrest under the Fourth Amendment and for a deprivation of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. *Id.* ¶ 9.[1]

The district court dismissed the action. The court concluded that respondent could advance no due process claim because he was never tried on the charges against him and accordingly was not denied his right to a fair trial under the Due Process Clause. App., *infra* at 9a-13a. The district court also concluded that respondent had failed to bring his Fourth Amendment false arrest claim in a timely fashion. App., *infra* at 12a-13a. Respondent sought reconsideration on only his Fourth Amendment claim. R. 18. The district court denied that motion, reasoning that a Fourth Amendment claim accrues when an allegedly unconstitutional search or seizure occurs, and not when criminal proceedings arising from that search or seizure are subsequently concluded. App., *infra* at 15a-16a. The court accordingly ruled that because respondent had failed to file suit within the applicable two-year limitations period, his Fourth Amendment claim was untimely. App., *infra* at 14a, 16a.

The court of appeals reversed the judgment in favor of Officer Jones, concluding that the district court had erred by ruling that respondent's Fourth Amendment claim was untimely. App., *infra* at 4a-5a. The court of appeals observed that in *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court had held that a section 1983 suit was premature if its success would "necessarily imply the invalidity of a conviction or sentence," and that the Seventh Circuit had previously held that the rule of *Heck* "applies not only to convicted persons but also to plaintiffs like [respondent] who

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[1] The complaint also sought relief under state law for the tort of malicious prosecution. R. 1 ¶ 9. The district court ultimately declined to exercise supplemental jurisdiction over the state-law claim. App., *infra* at 13a.

as yet only face prosecution." App., *infra* at 3a. The court acknowledged that some wrongful arrest claims accrue immediately under *Heck*, since "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." App., *infra* at 4a (quoting *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996), cert. denied, 519 U.S. 1113 (1997)). Nevertheless, in this case, the court held that "[i]f, as alleged, [respondent] was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of the prosecution premised on the planted drugs." App., *infra* at 4a. The court held that respondent's Fourth Amendment claim did not accrue until the criminal charges against him were dropped and therefore the claim was timely. App., *infra* at 4a-5a. The court added that damages were available under the Fourth Amendment only for the period of time between respondent's arrest and the filing of charges against him, at which point the applicability of the Fourth Amendment was at an end. App., *infra* at 5a-6a. The court affirmed the judgment in favor of the City of Chicago, holding that respondent had abandoned his claim against the City by failing to advance it on appeal. App., *infra* at 6a.

REASONS FOR GRANTING THE PETITION

There is rampant confusion and outright conflict in the circuits on the application of this Court's holding in *Heck v. Humphrey* to Fourth Amendment false arrest claims. The circuits divide into competing camps on *Heck*'s meaning for Fourth Amendment claims, and the disorder is only growing. The accrual rule adopted by the Seventh Circuit, moreover, is inconsistent with critical aspects of this Court's reasoning in *Heck*. Indeed, the error below becomes particularly apparent in light of this Court's subsequent decision in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004). In addition, the accrual rule adopted by the Seventh Circuit for Fourth Amendment claims (and used in at least three other circuits as well)

creates serious practical difficulties for courts and litigants alike. Accordingly, the court should grant plenary review or, in the alternative, vacate the judgment below and remand for reconsideration in light of the intervening decision in *Nelson*.

1. In *Heck*, this Court held that "when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." 512 U.S. at 487. Thus, when a section 1983 claim, if successful, would require vacatur of a state tribunal's judgment, that claim is not cognizable. See *Edwards v. Balisok*, 520 U.S. 641, 645-46 (1997). Conversely, "if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." *Heck*, 512 U.S. at 487 (emphasis in original). In *Heck*, the Court concluded that the petitioner's section 1983 claim was premature because his claim attacked the constitutionality of a conviction that was still in effect, meaning that "the § 1983 claim has not yet arisen." *Id.* at 489. And while *Heck* itself was filed by a plaintiff currently under a judgment of conviction, every circuit to consider the question has held that *Heck* delays accrual of section 1983 cases brought not only by convicted criminal defendants, but also of claims brought by persons facing pending criminal charges when the suit, if successful, would necessarily invalidate a potential conviction on the pending charges. See, *e.g.*, *Harvey v. Waldron*, 210 F.3d 1008, 1013-14 (9th Cir. 2000); *Beck v. City of Muskogee Police Department*, 195 F.3d 553, 557 (10th Cir. 1999); *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 397-98 (6th Cir.), cert. denied, 528 U.S. 1021 (1999); *Covington v. City of New York*, 171 F.3d 117, 124-25 (2d Cir.), cert. denied, 528 U.S. 946 (1999); *Uboh v. Reno*, 141 F.3d 1000, 1006-07 (11th Cir.

1998); *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997), cert. denied, 523 U.S. 1073 (1998); *Smith v. Holtz*, 87 F.3d 108, 113 (3d Cir.), cert. denied, 519 U.S. 1041 (1996); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995) (per curiam). Thus, the Seventh Circuit applied *Heck* to this case even though respondent was never convicted on the charges against him. See App., *infra* at 3a.

In *Heck*, even as the Court held that the claim before it would not accrue unless and until the judgment of conviction were set aside, the Court distinguished Fourth Amendment claims:

> [A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in § 1983 plaintiff's still outstanding conviction. Because of doctrines like independent source and inevitable discovery, and especially harmless error, such a § 1983 action, even if successful, would not *necessarily* imply that the plaintiff's conviction was unlawful.

512 U.S. at 487 n.7 (emphasis in original) (citations omitted).[2] As the Seventh Circuit itself has noted, the import of *Heck*'s footnote 7 is not entirely clear:

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[2] The Court offered a qualification to this observation:

> An example of . . . a § 1983 action that does not seek damages directly attributable to conviction or confinement but whose successful prosecution would necessarily imply that the plaintiff's criminal conviction was wrongful . . . would be the following: A state defendant is convicted of and sentenced for the crime of resisting arrest, defined as intentionally preventing a peace officer from effecting a *lawful* arrest. (This is a common definition of that offense.) He then brings a § 1983 action against the arresting officer, seeking damages for violation of his Fourth Amendment right to be free from unreasonable seizures. In order to prevail in this § 1983 action, he would have to negate an element of the offense of which he has been convicted.

512 U.S. at 486 n.6 (emphasis in original) (citations omitted).

> On the one hand, it could mean that some Fourth Amendment claims brought under § 1983 would not necessarily be barred if the record revealed the tainted evidence used against the plaintiff at the criminal trial would have been admitted anyway (e.g. under a theory of inevitable discovery). In that case, the district court presumably would have to determine whether the record supported such a theory. On the other hand, the footnote might mean that Fourth Amendment claims for unlawful searches or arrest do not necessarily imply a conviction is invalid, so in all cases these claims can go forward.

Copus v. City of Edgerton, 151 F.3d 646, 648 (7th Cir. 1998). And, indeed, footnote 7 has spawned considerable confusion in the circuits.

Four circuits have concluded that when success on a section 1983 Fourth Amendment claim would mean that evidence material to an accused's guilt or innocence in parallel state criminal proceedings should have been suppressed as the fruit of a Fourth Amendment violation, the Fourth Amendment claim does not accrue. For example, in *Harvey*, the Ninth Circuit observed that "the evidence seized in the allegedly unlawful search—gaming devices—was an essential element of the crime for which Harvey was charged—illegal possession of gaming devices." 210 F.3d at 1015-16. The court concluded that Harvey's Fourth Amendment claim was not "cognizable under *Heck* until the criminal charges against him were dismissed in December 1994." *Id.* at 1016. In *Shamaeizadeh*, the plaintiff had been charged with possession of marijuana plants and growing equipment as a result of a search that Shamaeizadeh claimed had violated the Fourth Amendment, and eventually criminal proceedings resulted in suppression of the plants and equipment. See 182 F.3d at 393-94. The Sixth Circuit concluded that Shamaeizadeh's section 1983 claim did not accrue until after criminal proceedings had terminated in his favor since "it appears that the only evidence to be introduced against

Shamaeizadeh was evidence discovered in Shamaeizadeh's house during the allegedly illegal search . . . ." *Id.* at 398. In *Woods v. Candela*, 47 F.3d 545 (2d Cir.) (per curiam), cert. denied, 516 U.S. 808 (1995), the court held that the plaintiff's Fourth and Fifth Amendment claims did not accrue until a state appellate court had concluded that his motion to suppress evidence should have been granted and the indictment against him dismissed. See *id.* at 546. The court applied that approach in *Covington*, and found that it could not decide whether the plaintiff's section 1983 false arrest claim had accrued before criminal charges against him had been dismissed because there was no information in the record "as to the nature of the evidence which might have been available against him in those proceedings." 171 F.3d at 123. The case was remanded to the district court to determine whether the prosecution could have been based on evidence other than that tainted by the alleged Fourth Amendment violation. See *id.* at 123-24. The Seventh Circuit took this same view of *Heck* in *Gauger v. Hendle*, 349 F.3d 354 (7th Cir. 2003). In that case, the court held that when a claim of illegal arrest would require suppression of a confession necessary to prove a subsequently filed charge beyond reasonable doubt, a false arrest claim would not accrue until criminal proceedings were terminated favorably to the accused. See *id.* at 361-62. The court of appeals followed that holding in the decision below. See App., *infra* at 5a.

In contrast, five other circuits have concluded that section 1983 claims that do not inevitably taint an ensuing prosecution or conviction accrue immediately on a constitutional violation even if they produce evidence material to an ensuing criminal prosecution. In *Beck*, for example, the plaintiff brought Fourth Amendment section 1983 claims attacking his arrest on a rape charge and the search and seizure of his vehicle in connection with that arrest. See 195 F.3d at 556, 558. The court concluded that Beck's Fourth Amendment claims accrued when the search and seizure

occurred and therefore were barred by the statute of limitations even though the rape charge had been brought against Beck and his probation had subsequently been revoked on the basis of the rape victim's testimony. See *id.* at 558-59. Relying on *Heck*'s footnote 7, the court concluded that "*Heck* does not affect the time these claims arose because ultimate success on them would not necessarily question the validity of a conviction resulting from the rape charge or his probation revocation." *Id.* at 558. The court added that "nothing in *Heck* changes the general rule that causes of action relating to an allegedly illegal arrest arise at the time of the arrest." *Ibid.* The court acknowledged that "[s]everal cases have held that whether a plaintiff's illegal arrest claim is affected by *Heck* depends on whether the evidence obtained as a product of the arrest is used at trial," and wrote, "[w]e generally disagree with the holdings in these cases because they run counter to *Heck*'s explanation that use of illegally obtained evidence does not, for a variety of reasons, necessarily imply an unlawful conviction." *Id.* at 559 n.4. Similarly, in *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), the court, citing *Beck*, held that even though the appellants had been tried on charges arising from their arrest, "claims based on the officers' physical abuse or arrest of the appellants accrued at the time those events occurred . . . ." *Id.* at 52. In *Brooks v. City of Winston-Salem*, 85 F.3d 178 (4th Cir. 1996), the court held that the plaintiff's false arrest claim accrued upon his arrest, even though he was subsequently prosecuted on the charge on which he had been arrested because "on the day of his arrest Brooks knew or should have known both of the injury resulting from his allegedly illegal seizure and who was responsible for that injury." *Id.* at 182. In addressing *Heck*, the court reasoned that "a charge that probable cause for a warrantless arrest was lacking, and thus that the seizure was unconstitutional, would not necessarily

implicate the validity of a subsequently obtained conviction—at least in the usual case." *Ibid.*[3] In *Simmons v. O'Brien*, 77 F.3d 1093 (8th Cir. 1996), the plaintiff brought a section 1983 action seeking damages for an allegedly coerced confession even though his motion to suppress that confession had been denied and his conviction had been upheld on appeal and in post-conviction proceedings. See *id.* at 1094. The court nevertheless concluded that the section 1983 claim had accrued, applying footnote 7 of *Heck*: "Because harmless error analysis is applicable to the admission at trial of coerced confessions, judgment in favor of Simmons on this § 1983 action challenging his confession will not *necessarily* demonstrate the invalidity of his conviction." *Id.* at 1095 (emphasis in original). Similarly, in *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam), the court held that the plaintiff's section 1983 claim challenging under the Fourth Amendment a search of his car that produced a rifle had accrued even though the plaintiff had pled guilty to the charge of being a felon in possession of the rifle, again relying on *Heck*'s footnote 7: "Datz's conviction might still be valid considering such doctrines as inevitable discovery, independent source, and harmless error." *Id.* at 253 n.1. The court reaffirmed the holding of *Datz* in *Hughes v. Lott*, 350 F.3d 1157, 1160-61 (11th Cir. 2003).

Thus, in the First, Fourth, Eighth, Tenth, and Eleventh Circuits, Fourth Amendment claims accrue even before a charge is dismissed or a conviction is vacated without any inquiry into the record of the underlying criminal proceedings to determine whether evidence essential to the prosecu-

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[3] The court qualified this statement by referring to *Heck*'s footnote six where this Court observed that a false arrest claim based on resisting arrest where one of the elements of the offense is that the arrest was lawful is barred until the conviction is set aside. See 85 F.3d at 182.

tion would be tainted if the alleged constitutional violation were established.

The Fifth Circuit takes yet a third view. It agrees with the Second, Sixth, Seventh and Ninth Circuits that *Heck* delays accrual of some false arrest claims, but it will not attempt to determine if a false arrest claim has accrued while the underlying criminal proceeding is still ongoing. Thus, in *Mackey*, the court concluded that if a section 1983 plaintiff alleging a false arrest "is convicted and evidence is presented by the prosecution at his criminal trial which is a direct or indirect product of one or more of his arrests, then his section 1983 damage claims challenging the validity of his arrests would appear to undermine the validity of his conviction and hence be barred by *Heck*." 47 F.3d at 746. But because the court could not yet tell what evidence would be offered against the plaintiff in the criminal proceedings pending against him, instead of remanding as in *Covington*, it directed the district court to "stay proceedings in the section 1983 case until the pendant criminal case has run its course, as until that time it may be difficult to determine the relation, if any, between the two." *Ibid.*

In short, as the Ninth Circuit has observed, "[t]here is a split in the circuits as to how *Heck*'s footnote 7 should be interpreted." *Harvey*, 210 F.3d at 1015. See also, *e.g.*, *Hughes*, 350 F.3d at 1160-61; *Shamaeizadeh*, 182 F.3d at 395. Commentators have also remarked upon the intractable nature of this conflict. See, *e.g.*, John Stanfield Buford, *When The Heck Does This Claim Accrue?* Heck v. Humphrey*'s Footnote Seven and § 1983 Damages Suits For Illegal Search and Seizure*, 58 Wash. & Lee L. Rev. 1493 (2001); Paul D. Bink, Note, *The Emergence of Divergence: The Federal Courts' Struggle To Apply* Heck v. Humphrey *To § 1983 Claims For Illegal Searches*, 35 Ind. L. Rev. 1085 (2002). The existence of this conflict is understandable; there is little doubt that ambiguity resides within *Heck*'s footnote 7 itself.

In light of the confusion and outright conflict in the circuits, this Court's guidance is needed.[4]

2. The court of appeals' holding in this case, like the similar holdings in four other circuits, misapprehends the accrual principles articulated in *Heck* and subsequent cases. These circuits, as we explain above, understand *Heck* to delay accrual in cases when a Fourth Amendment claim, if successful, would require suppression of evidence essential to sustain the charge against the accused. Thus, these circuits ask whether the Fourth Amendment claim could be sustained without requiring the exclusion of evidence necessary to convict the accused. That approach reflects a flawed understanding of *Heck*.

In *Heck*, the Court expressly declined to adopt a rule that section 1983 actions should be barred whenever they "would resolve a necessary element to a likely challenge to a conviction . . . ." 512 U.S. at 488. *Heck* accordingly was not based on a concern about potential inconsistencies between the judgments of state and federal courts, which the Court

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[4] The confusion spawned by footnote 7 is well illustrated by the uneven course charted by the Seventh Circuit itself. That court had repeatedly held that Fourth Amendment claims accrue immediately under *Heck* even when those claims are eventually sustained in the underlying criminal proceedings, causing the suppression of such critical evidence that the prosecution was abandoned. See, *e.g.*, *Gonzalez v. Entress*, 133 F.3d 551, 553-54 (7th Cir. 1998); *Washington*, 127 F.3d at 556-57; *Booker*, 94 F.3d at 1054-56. Indeed, the court had at one time stated that "any § 1983 claim for damages resulting from a false arrest is not barred by *Heck* and accrues immediately after the arrest, because such alleged violations of the Fourth Amendment would not necessarily impugn the validity of the conviction." *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 897 (7th Cir. 2001). Accord *Copus*, 151 F.3d at 648. Other circuits had understood the law in the Seventh Circuit in this fashion as well. See *Harvey*, 210 F.3d at 1015; *Shamaeizadeh*, 182 F.3d at 395. The Seventh Circuit reversed field in *Gauger*, dismissing its prior statements as mere "dicta." 349 F.3d at 361.

explained are properly addressed not by rules about the scope of section 1983 but instead by a variety of other doctrines that reflect principles of comity between the federal and state courts. See *id.* at 488-90 & nn. 8-9. Instead of expressing concern about any inconsistency between the rulings of federal and state courts about what evidence may be tainted by a constitutional violation, *Heck* rested its holding on the principles governing the damages available to plaintiffs who cannot establish that antecedent legal proceedings terminated in their favor. The Court observed:

> The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. But a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of society.

Id. at 484 (internal quotations and citations omitted). Thus, the Court distinguished false arrest and malicious prosecution actions, noting that Heck's claim was properly characterized as malicious prosecution because it sought damages for confinement pursuant to legal process. Then, to determine when Heck's action accrued, the Court noted that "[o]ne element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." *Ibid.* Because Heck had advanced what was properly characterized as a malicious prosecution action, the Court held that his claim did not accrue until the underlying criminal proceeding had terminated in his favor. See *id.* at 489-90.

This discussion makes the Seventh Circuit's error manifest. As the court of appeals acknowledged in the decision below, respondent's Fourth Amendment claim enables him to recover damages only for the deprivation of his liberty prior to the time that charges were brought against him, because the Fourth Amendment's applicability is at an end once the arrestee is charged with an offense. See App., *infra* at 6a. See also *Gauger*, 349 F.3d at 362-63.[5] As *Heck* explains, such claims are properly characterized as asserting a false arrest, not a malicious prosecution. Indeed, as the Seventh Circuit also acknowledged, respondent has insisted that his claim "was not one for malicious prosecution." App., *infra* at 6a. Yet under the accrual rule adopted in *Heck*, favorable termination of the underlying criminal proceedings is required for a malicious prosecution action, but not for a false arrest claim. Thus, the Seventh Circuit, like the Second, Fifth, Sixth, and Ninth Circuits, has misread the accrual principles found in *Heck* by imposing a favorable termination requirement for accrual of a section 1983 false arrest claim. *Heck* makes clear that false arrest claims accrue at the time of the arrest—long before the resulting criminal proceedings will have terminated.

To be sure, *Heck* also expresses concern about the use of section 1983 to mount "a collateral attack on the conviction

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[5] In *Albright v. Oliver*, 510 U.S. 266 (1994), Justice Ginsburg expressed the view that an individual facing criminal charges is subject to a "continuing seizure" as long as the prosecution lasts and accordingly a Fourth Amendment claim does not accrue until the prosecution ends. See *id.* at 277-80 (concurring opinion). Two other Members of the Court expressed agreement with this conclusion. See *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). The Seventh Circuit has consistently rejected this view, however, as the decision below notes. See App., *infra* at 5a-6a. Instead, the decision below rests on an interpretation of *Heck* and not a theory of "continuing seizure." Nevertheless, if the petition is granted, this case would provide an appropriate vehicle for the Court to consider the accrual rule endorsed by three Justices in *Albright*.

through the vehicle of a civil suit." 512 U.S. at 484. And in his separate opinion, Justice Souter opined that *Heck* may well stand only for the proposition that a litigant under an outstanding judgment of conviction may not use section 1983 as a vehicle for circumventing the requirement in the habeas corpus statute of exhausting state remedies before challenging the lawfulness of his confinement in federal court. See *id.* at 498-501 (Souter, J. concurring in the judgment). But even on that view, the accrual rule adopted by the Seventh Circuit, as well as the similar holdings in the Second, Fifth, Sixth, and Ninth Circuits, remains indefensible.

It has long been settled that a challenge to the fact or duration of confinement pursuant to the judgment of a state court is cognizable only under the habeas corpus statute. See *Preiser v. Rodriguez*, 411 U.S. 474 (1973). See also 28 U.S.C. § 2254 (2000). It follows that a section 1983 claim that does not attack the fact or duration of the plaintiff's confinement pursuant to legal process accrues even under *Heck*, as at least six Members of the Court have observed. See *Spencer v. Kemna*, 523 U.S. 1, 20-21 (1998) (Souter, J., joined by O'Connor, Ginsburg, and Breyer, JJ., concurring); *id.* at 21-22 (Ginsburg, J., concurring); *id.* at 25 n.8 (Stevens, J., dissenting); *Heck*, 512 U.S. at 490-91 (Thomas, J., concurring). This Court's most recent decisions applying *Heck* make this point particularly clear. In *Muhammad v. Close*, 124 S. Ct. 1303 (2004), for example, the Court held that a section 1983 suit brought by a prisoner seeking damages for the conditions of his confinement prior to a prison disciplinary hearing accrued at that time because "he raised no claim on which habeas relief could have been granted on any recognized theory, with the consequence that *Heck*'s favorable termination requirement was inapplicable." *Id.* at 1306. *Nelson v. Campbell*—a case not decided until after the court of appeals' decision in this case—was even more pointed on the subject of *Heck*. In *Nelson*, the Court held that a prisoner under a sentence of death could bring a

section 1983 action challenging the method to be used to administer a lethal injection because the action would not attack a state court's judgment or prevent it from being carried out. See 124 S. Ct. at 2123-24. The Court also explained why the action was cognizable despite *Heck*'s holding that some section 1983 actions cannot be brought until the underlying judgment against the accused has been vacated:

> This "favorable termination" requirement is necessary to prevent inmates from doing indirectly through damages actions what they could not do directly by seeking injunctive relief—challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute. Even so, we were careful in *Heck* to stress the importance of the term "necessarily." For instance, we acknowledged that an inmate could bring a challenge to the lawfulness of a search pursuant to § 1983 in the first instance, even if the search revealed evidence used to convict the inmate at trial, because success on the merits would not "*necessarily* imply that the plaintiff's conviction was unlawful." To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff might never obtain favorable termination—suits that could otherwise have gone forward had the plaintiff not been convicted. In the present context, focusing attention on whether petitioner's challenge to the cut-down procedure would *necessarily* prevent Alabama from carrying out its execution both protects against the use of § 1983 to circumvent any limits imposed by the habeas statute and minimizes the extent to which the fact of a prisoner's imminent execution would require differential treatment of his otherwise cognizable § 1983 claim.

Id. at 2124 (emphasis in original) (citations omitted). Thus, *Nelson* makes clear that *Heck* bars section 1983 actions only when they challenge the fact or duration of confinement or otherwise assert a claim necessarily premised on the fact that

the section 1983 plaintiff was charged with or convicted of a crime.

Thus, at least after *Nelson*, the approach to section 1983 Fourth Amendment claims taken by the Second, Fifth, Sixth, Seventh, and Ninth Circuits is wholly untenable. A false arrest claim does not challenge the fact or duration of confinement or state a claim necessarily available only to those who have been charged with or convicted of a crime. Nor does a false arrest claim necessarily attack the validity of an arrestee's subsequent conviction. To the contrary, "the established rule [is] that illegal arrest or detention does not void a subsequent conviction." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Accord, *e.g.*, *United States v. Crews*, 445 U.S. 463, 474 (1980) ("An illegal arrest, without more, has never been viewed . . . as a defense to a valid conviction."). Even when an alleged Fourth Amendment violation produces all the evidence used to prosecute the accused, a subsequent conviction still does not bar the accused from seeking damages under section 1983 for the violation of his Fourth Amendment rights, as this Court squarely held in *Haring v. Prosise*, 462 U.S. 306 (1983). In that case, the Court concluded that a prisoner's section 1983 action to recover damages for an illegal search and seizure was not inconsistent with his plea of guilty to possessing the items found in the search. See *id.* at 316. At most, *Heck* only limits the damages available in such an action by holding that the "actual, compensable injury" for which damages are available under section 1983 "does *not* encompass the 'injury' of being convicted and imprisoned (until his conviction has been overturned)." 512 U.S. at 487 n.7 (emphasis in original). Similarly, a claim for false arrest can be immediately brought despite *Heck* because it does not depend on whether the arrestee is subsequently prosecuted or convicted. Indeed, it is clear that the victim of an allegedly unconstitutional arrest

may seek damages for the arrest even if he is never subsequently prosecuted. See, *e.g.*, *Monroe v. Pape*, 365 U.S. 167 (1961).

In this case, the damages that the court of appeals has held respondent may pursue for the deprivation of his liberty prior to the time that he was charged with an offense are plainly damages that respondent would have been able to recover even if he had never been charged with a crime. *Nelson* clearly explains that the ability to sue for such damages is unaffected by the favorable termination requirement of *Heck*. Because the decision below applies *Heck*'s favorable termination requirement to respondent's claim, it is inconsistent with *Nelson*, which preserves suits that could otherwise have gone forward if the plaintiff had not been criminally prosecuted.[6]

3. The approach to accrual of Fourth Amendment section 1983 claims taken by the Second, Sixth, Seventh, and Ninth Circuits also creates serious practical problems for litigants and courts alike. That is because these circuits understand *Heck* to delay accrual only in cases where the section 1983 plaintiff could not be convicted based on evidence untainted

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[6] To be sure, if a section 1983 Fourth Amendment action is brought while a related state criminal prosecution is pending, there is the possibility that the federal civil action will interfere with the state prosecution. As *Heck* itself explains, however, the appropriate way to address that problem is to stay the federal action pending the outcome of the criminal proceeding, rather than to hold that the federal action cannot be brought. See 512 U.S. at 487 n.8. Moreover, the state court's findings on a Fourth Amendment issue, made in the criminal litigation, will be binding in the subsequent section 1983 litigation. See *Allen v. McCurry*, 449 U.S. 90 (1980). These abstention and preclusion doctrines minimize friction between federal and state adjudications and confirm that these claims can and should accrue without regard to the pendency of a criminal prosecution.

by the alleged Fourth Amendment violation. It will, however, frequently be quite difficult for litigants and courts to apply this test.

A defendant facing criminal charges who believes that his arrest violated the Fourth Amendment will frequently be unable to determine whether or not evidence independent of this violation is available to the prosecution. After all, when the criminal case has yet to be tried, the accused cannot know with certainty what evidence will be offered against him and thus cannot know whether evidence that the accused believes to be the fruit of a Fourth Amendment violation would be essential. Accordingly, under the accrual rule adopted below and in at least three other circuits, the accused will frequently be unable to determine whether his Fourth Amendment claim has accrued because he will not know how essential the evidence that he believes to be tainted by a Fourth Amendment violation is likely to be to the prosecution's case against him. And if the accused attempts to deal with this uncertainty by filing his section 1983 suit immediately—to avoid the risk of an eventual ruling that his section 1983 claim is time barred—the litigants and the district court must then that speculate about what evidence the prosecution will offer at trial—or would have offered at trial if the case is ultimately resolved without need of a trial. As Judge Glasser explained in his dissenting opinion in *Covington*,

> The remand the majority would adopt would place upon the district court an impossible and totally unrealistic burden. It would require that court to determine and assess the strength of all the evidence available to the state, to determine whether a motion to suppress evidence or statements based upon an allegedly unlawful arrest or a claimed unreasonable search should be denied because any one or more of the many exceptions would permit the evidence to be received, e.g., that the evidence seized was in plain view; would have been inevitably discovered; was obtained during an

> inventory search; was subject to a good faith exception; was seized under exigent circumstances; when the statement was made the interrogation was no longer custodial; or whether the state had evidence entirely independent of an arrest or search that would have been enough to obtain a conviction such as the testimony of an eye witness or informant.

171 F.3d at 128.

The problems to which Judge Glasser referred in his *Covington* dissent are not uncommon. As cases such as *Covington*, *Gauger*, and *Mackey* demonstrate, pending charges frequently rest on a combination of evidence tainted by an alleged Fourth Amendment violation and independent evidence. Accordingly, determining whether the cause of action accrued immediately upon the accused's arrest is no simple matter. Even a case like this one—in which the section 1983 plaintiff claims that the entire case against him was fabricated—determining whether the cause of action has accrued may not be easy. While respondent's complaint alleges that the case against him rested entirely on the fabricated account of Officer Jones, of course he cannot know whether Officer Jones would have been the only witness called against him had the case gone to trial. The prosecution is frequently able to pursue charges based on evidence independent of an alleged Fourth Amendment violation. Statutes of limitations, like jurisdictional rules, should be free from doubt. The accrual rule adopted below, however, is anything but.

Moreover, the accrual rule used in the Second, Fifth, Sixth, Seventh, and Ninth Circuits threatens the sound administration of justice. Under that rule, the accrual of Fourth Amendment claims will frequently be delayed for years—until criminal cases are resolved by trial, appeal, or even post-conviction proceedings. This accrual rule therefore undermines a fundamental purpose of any statute of limitations—

"to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226 (2002). Accord, *e.g.*, *Young v. United States*, 535 U.S. 43, 47 (2002); *Rotella v. Wood*, 528 U.S. 549, 555 (2000). This problem is particularly acute for big-city police officers, who frequently make dozens of arrests in a year and will have difficulty recalling the particulars of any given arrest years later—whereas the section 1983 plaintiff will frequently and credibly claim to have a perfect memory of the events at issue. The interests of justice favor prompt litigation of Fourth Amendment claims, while memories are still fresh and critical witnesses and documents are still available.

4. There is an urgent need for this Court's guidance on the question presented by this petition. False arrest suits brought by individuals who have been prosecuted on related charges are ubiquitous. The ambiguity of *Heck*'s footnote 7 requires litigants and courts to devote substantial resources to litigating the accrual rules governing Fourth Amendment claims, rather than addressing the merits of these cases. The interests of justice will plainly be served by an authoritative resolution of the accrual principles applicable to Fourth Amendment claims. In the alternative, because the intervening decision in *Nelson* has considerably clarified the law in this area, the Court may wish to summarily vacate the judgment of the court of appeals and remand this case to the court of appeals for reconsideration in light of the decision in *Nelson*.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY,
Plaintiff-Appellant,

v.

CITY OF CHICAGO AND BRODERICK JONES, #17432,
CHICAGO POLICE OFFICER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 6076—Paul E. Plunkett, *Judge.*

ARGUED NOVEMBER 12, 2003—
DECIDED MARCH 22, 2004

Before BAUER, MANION, and ROVNER, *Circuit Judges.*

MANION, *Circuit Judge.* Reginald Wiley alleges that for several years Chicago police officer Broderick Jones has been framing innocent citizens and arresting them without cause. According to Wiley, Jones's routine in each case is the same: he and his partner approach a suspected drug dealer; if a search fails to reveal any incriminating evidence, they plant drugs on him and profess that he was engaged in illegal activity. Wiley claims that in January 2000 he was the victim of one of Jones's frame-ups. He was arrested and prosecuted

for possession of narcotics, though the charge was eventually dismissed in July 2002. One month later Wiley sued Jones and the City of Chicago under 42 U.S.C. § 1983 for "wrongful prosecution," alleging that Jones fabricated evidence in order to arrest him and thereafter misrepresented his guilt to prosecutors. Wiley further alleged that Jones was able to accomplish his misdeeds by virtue of the City's deliberate indifference to its officers' conduct.

The district court dismissed Wiley's suit for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court understood Wiley to be asserting that he was prosecuted without probable cause, a cause of action under § 1983 that we rejected in *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001). The court allowed that even if Wiley did not have a claim in federal court for wrongful or malicious prosecution, the alleged conduct might still be actionable if it violated a substantive constitutional right, like the due process right to a fair trial. But despite Wiley's contention that his fair trial rights had been violated, the court concluded that Wiley did not have any such claim. Wiley moved to amend the judgment, Fed. R. Civ. P. 59(e), arguing that the court had overlooked his Fourth Amendment claim against Jones. The district court construed Wiley's Fourth Amendment claim as one for false arrest and denied the motion. Citing *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892 (7th Cir. 2001), the court held that any Fourth Amendment cause of action against Jones began to accrue at the time of arrest and so Wiley's claim—filed more than two years after his arrest—was untimely, *Gonzales v. Entress*, 133 F.3d 551, 554 (7th Cir. 1998) (statute of limitations on civil rights action is two years in Illinois).

On appeal both parties agree that if Jones arrested Wiley on the basis of planted "evidence," Wiley would have a Fourth Amendment claim for false arrest. What the parties dispute is *when* Wiley's claim began to accrue. Wiley argues that the

two-year statute of limitations did not begin to run until the charges against him were dismissed; the defendants maintain that his claim began to accrue at the time of the arrest and must now be barred as untimely.

We begin with first principles and therefore start our discussion with *Heck v. Humphrey*, 512 U.S. 477 (1994). *Heck* bars any suit for damages premised on a violation of civil rights if the basis for the suit is inconsistent with or would undermine the constitutionality of a conviction or sentence. *Id.* at 486-87. Should success in a civil suit necessarily imply the invalidity of a conviction or sentence, *Heck* requires the potential plaintiff to wait until his conviction is nullified before bringing suit. *Id.* This rule applies not only to convicted persons but also to plaintiffs like Wiley who as yet only face prosecution. *Gonzales*, 133 F.3d at 553. "If success on the [defendant's] claims would have necessarily implied the invalidity of a potential conviction on the . . . charge, then [defendant's] claims did not accrue until the day on which the . . . charge was dismissed." *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997). So if a prisoner or an individual facing prosecution seeks damages using § 1983 for an alleged violation of his civil rights, a district court must first determine whether "a judgment in favor of the plaintiff would necessarily imply the invalidity" of the plaintiff's actual or potential conviction. *Heck*, 512 U.S. at 487. If it would, then the suit is barred and the complaint must be dismissed. *Id.*

Following *Heck*, this court has often held that civil rights claims of false or wrongful arrest arising out of the Fourth Amendment begin to accrue at the time of arrest regardless of subsequent proceedings. *See, e.g., Copus v. City of Edgerton*, 151 F.3d 646, 648-49 (7th Cir. 1998); *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996); *Simpson v. Rowan*, 73 F.3d 134, 136 (7th Cir. 1995). The rationale behind this approach is that a wrongful arrest claim does not necessarily undermine

a conviction; "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." *Booker*, 94 F.3d at 1056; *see also Gonzales*, 133 F.3d at 553; *Washington*, 127 F.3d at 556. Therefore, generally speaking, claims for wrongful arrest may be brought immediately because "the injury of being detained illegally is compensable regardless of whether the plaintiff is later convicted or even prosecuted." *Snodderly*, 239 F.3d at 897.

But this general approach must not be understood as a rule to be applied in every case. The defendants urge us to view our cases such as *Booker*, *Washington*, and *Gonzales* as creating an invariable rule that false arrest claims under the Fourth Amendment accrue at the time of arrest. Such may be the case most of the time, but not always. For while we recognize that discussion in our earlier decisions may have implied such a rule, *see Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003), the accrual of the civil rights claims brought in this and other cases is ultimately governed by the Supreme Court's decision in *Heck*. And as we recently explained in *Gauger*, because "sometimes a successful challenge to a false arrest can indeed impugn the validity of the plaintiff's conviction," *Heck* may in fact occasionally bar a civil rights claim premised on a false or wrongful arrest. *Id.* As a result, plaintiffs complaining of false arrest will sometimes have to wait until their criminal charge or conviction is set aside or dismissed before they can bring suit. *See id.*

This may be one of those times. If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs. *See id.* at 362. Therefore, any civil suit against Officer Jones for a false arrest would necessarily imply the invalidity of a potential conviction, and *Heck* requires that Wiley's Fourth Amendment claim would not begin to accrue until the charges were dismissed. *See Heck*,

512 U.S. at 489-90; *Washington*, 127 F.3d at 556. Of course had Wiley been prosecuted on evidence (other than the planted drugs) that would not be invalidated if he successfully challenged his arrest, then Wiley's false arrest claim would not be barred by *Heck* and would be untimely. *See Gonzales*, 133 F.3d at 553-54. Because at this stage in the proceedings we accept Wiley's allegations as true, *see McCullah v. Gadert*, 344 F.3d 655, 657 (7th Cir. 2003), we remand this case with instructions to reinstate Wiley's Fourth Amendment claim against Jones for false arrest.

The conclusion we reach here is supported by our recent decision in *Gauger*. Gary Gauger had been convicted of murder based on statements he made to detectives during an 18-hour interrogation. *Gauger*, 349 F.3d at 356-57. His conviction was overturned on grounds that his statements were inadmissable because the officers lacked probable cause to arrest him in the first place. *Id.* at 357. Although more than two years had passed from the time of his unlawful arrest until the filing of his § 1983 complaint, we deemed Gauger's claim timely. *Id.* at 362. For Gauger to attack his arrest, we reasoned, "was implicitly to challenge the legality of his conviction, which rested crucially on the statements that he made to the police when he was questioned after being arrested." *Id.* at 361. Therefore, because *Heck* barred him from challenging his arrest until he had his conviction overturned, his false arrest claim did not begin to accrue until he had done so. *Id.* at 361-62. Similarly here, if Wiley's attack on his arrest would challenge the only evidence supporting a potential conviction, then his claim did not begin to accrue until the charges were dismissed in July 2002. *See id.*

For guidance on remand, we also consider the scope of Wiley's claim. Wiley contends that his Fourth Amendment claim encompasses not only the false arrest but also his subsequent "wrongful prosecution," which Jones allegedly initiated and extended by lying to prosecutors. Wiley argues

that we should consider him to have been wrongfully detained under the "continuing seizure" approach set forth by Justice Ginsburg, who suggested that a defendant ought to be considered "seized" under the Fourth Amendment "so long as he is bound to appear in court and answer the state's charges." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).

But we have repeatedly rejected the "continuing seizure" approach. *McCullah*, 344 F.3d at 661; *Lee v. City of Chicago*, 330 F.3d 456, 463 (7th Cir. 2003); *Reed v. City of Chicago*, 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989). Instead, we have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment; "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger*, 349 F.3d at 362-63. Once arraigned, the prosecution is underway. If that prosecution is at some point deemed malicious, then it "is not a constitutional tort unless the state provides no remedy for malicious prosecution." *Id.* at 359. But at oral argument Wiley's counsel insisted that his case was not one for malicious prosecution.

One final matter remains. Although Wiley alleged in his complaint that the City of Chicago was deliberately indifferent to the misconduct of its police officers, he has waived this claim by failing to advance it on appeal. *See Duncan v. Wis. Dep't of Health & Family Serv.*, 166 F.3d 930, 934 (7th Cir. 1999).

We therefore remand this case to the district court with instructions to reinstate Wiley's Fourth Amendment false arrest claim against Officer Jones. The scope of this claim, should Wiley prevail on its merits, is limited to the time from his arrest until he was charged.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY,
Plaintiff-Appellant,

v.

CITY OF CHICAGO AND BRODERICK JONES, #17432,
CHICAGO POLICE OFFICER,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 6076—Paul E. Plunkett, *Judge.*

April 16, 2004

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

On consideration of the Petition for Rehearing En Banc filed by plaintiff-appellant, in the above-captioned case by plaintiff-appellant, no judge in active service has requested a vote on the Petition for Rehearing En Banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 6076
Paul E. Plunkett, Senior Judge

REGINALD WILEY,

Plaintiff,

v.

CITY OF CHICAGO and BRODERICK JONES,

Defendants.

January 23, 2003

MEMORANDUM OPINION AND ORDER

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U.S.C. § ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. ¶ 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (*Id.* ¶¶ 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (*Id.* ¶ 7.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (*Id.* ¶ 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of $100,000.00.

The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. *Forseth v. Village of Sussex*, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Discussion

Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. § 1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. *Id.; Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. *See Newsome v. McCabe*, 256 F.3d 747, 750-51(7th Cir. 2001) (stating that the "effective holding" of *Albright v. Oliver*, 510 U.S. 266 (1994) is that prosecution without probable cause violates due process if it deprives the plaintiff of "an adequate opportunity to defend

himself in [a] criminal prosecution," but is actionable under section 1983 only if state post-deprivation remedies are inadequate); *see also Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002) (quoting *Newsome* for the proposition that "there is no constitutional right not to be prosecuted without probable cause.") (internal quotation marks and citation omitted).

Though malicious prosecution itself is not actionable under section 1983, the conduct underlying that label—suppression of exculpatory evidence, subornation of perjury and the like—is actionable if it violates a substantive constitutional right, like the due process right to a fair trial. *Penn*, 296 F.3d at 576; *Newsome*, 256 F.3d at 752. Plaintiff contends that his allegations state a claim for violation of his fair trial rights, even though he was never actually tried.

The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." *Christman v. Hanrahan*, 500 F.2d 65, 67 (7th Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation . . . result[s] unless the misconduct [has] some prejudicial impact on the defense." *Id.* Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." *Id.* at 68.

Our court of appeals reaffirmed this view of due process in *Hensley v. Carey*, 818 F.2d 646 (7th Cir. 1987). The plaintiff in that case had been arrested on a variety of criminal charges, largely on the strength of the victim's line-up identification. The charges were later dropped when the victim recanted the identification. Plaintiff filed a section 1983 action against the police officers who ran the line-up, claiming that it was unduly suggestive and, as a result, violated his due process rights.

The Seventh Circuit rejected plaintiff's argument that an improper line-up, by itself, violates due process:

> [The Supreme Court cases] establish a rule which bars the admission of unreliable evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under § 1983.

Id. at 649. Even if the line-up were suggestive, the court said, the identification evidence did not deprive him of his right to a fair trial because he was never tried. *Id.* at 649. Thus, the court concluded, plaintiff did not have a viable section 1983 claim. *Id.*

Plaintiff does not allege that he was tried for the charges on which he was arrested. In fact, in his response to the City's motion, he admits that the "charges were dismissed before trial." (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) That admission dooms his section 1983 fair trial due process claims against both the City and, though he did not file a motion to dismiss, defendant Jones.

The Seventh Circuit's opinion in *Whitley v. Siebel*, 613 F.2d 682 (7th Cir. 1980) does not dictate a different result. *Whitley* is a section 1983 false arrest case that was analyzed under the rubric of due process. *Id.* at 684. In the *Whitley* court's view, a police officer who procured arrest authority through deliberate misrepresentations violated the plaintiff's right not to be seized without due process of law. *Id.* at 686. The case says nothing, however, about whether such conduct violated his due process right to a fair trial.

Plaintiff's reliance on *Jones v. City of Chicago*, 856 F.2d 985 (7th Cir. 1988) is similarly misplaced. In that case, a young man who had been wrongfully arrested and jailed, but was never tried, sued the City and various police officers

under section 1983 for false arrest, false imprisonment and malicious prosecution. In the course of its opinion, the court said:

> [A]t some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth Amendment to the due process clause. . . . But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors . . . to confine or prosecute him.

Id. at 994. That statement suggests that police misconduct that occurs after an arrest and results in continued wrongful confinement, *i.e.*, malicious prosecution, can form the basis of a section 1983 due process claim, even if the victim's fair trial rights are not impaired.

But that reading of *Jones*, cannot survive *Newsome*, which holds that malicious prosecution, to the extent it violates due process at all, is not actionable under section 1983. *Newsome*, 256 F.2d at 750-52. After *Newsome*, a person who is wrongfully arrested can file a section 1983 Fourth Amendment claim contesting his arrest and the resulting confinement, and one whose fair trial rights are violated by police misconduct after the arrest can file a section 1983 Fourteenth Amendment claim. *Id.* at 751-52. But someone who is unlawfully arrested, does not file a timely Fourth Amendment claim and is never tried, cannot contest his pre-trial detention on the theory that the police officers' failure to tell the prosecutor about their misconduct deprived him of liberty without due process of law. *Id.* at 750-51. That is precisely what plaintiff is attempting to do here, an effort that cannot

succeed in this circuit.[1] Plaintiff's section 1983 due process claims, therefore, must be dismissed.

State Claims

Having dismissed the only federal claims in this lawsuit, the Court declines to exercise its supplemental jurisdiction over plaintiff's state-law claims. *See* 28 U.S.C. § 1367(c)(3) (stating that court may decline to exercise supplemental jurisdiction over state claims if it has "dismissed all claims over which it [had] original jurisdiction").

Conclusion

For the reasons set forth above, the City's Rule 12(b)(6) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

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[1] The out-of-circuit cases cited by plaintiff suggest that his claim might succeed elsewhere, but that does not change the result of this case.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 C 6076
Paul E. Plunkett, Senior Judge

REGINALD WILEY,

Plaintiff,

v.

CITY OF CHICAGO and BRODERICK JONES,

Defendants.

February 18, 2003

ORDER ON MOTION TO RECONSIDER

On January 27, 2003, the Court entered judgment in favor of defendants on plaintiffs complaint. Plaintiff has filed a timely Federal Rule of Civil Procedure 59(e) motion to alter or amend seeking reinstatement of the section 1983 false arrest claim, he asserted against defendant Jones.

Plaintiff alleges that Jones arrested him on January 9, 2000. (Compl. ¶ 5.) But he did not file his complaint until August 26, 2002, well after the two-year limitations period applicable to his false arrest claim had expired. *Kalimara v. Illinois Dep't of Corr.*, 879 F.2d 276, 277 (7th Cir. 1989) (stating that statute of limitations for section 1983 actions filed in Illinois is two years).

Plaintiff acknowledges that he was arrested more than two years before he filed suit, but contends that his claim is still timely. Because the premise of his false arrest claim is that

Jones fabricated evidence against him, plaintiff says that success on that claim would necessarily have undermined the criminal case against him. As such, he says, *Heck v Humphrey*, 512 US, 477 (1994) precluded him from filing suit until the criminal case was resolved in his favor. The criminal charges against him were dismissed on July 8, 2002 (*see* Compl. ¶ 7), about a month before be filed his complaint, Thus, plaintiff says, his false arrest claim is timely.

Plaintiff's argument was squarely rejected by the Seventh Circuit in *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892 (7th Cir. 2001). Snodderly, like the plaintiff in this case, filed a false arrest claim more than two years after he was arrested, but within two years after the criminal charges against him were dismissed. The district court dismissed the claim as untimely and Snodderly appealed. On appeal, Snodderly argued that Heck precluded him, from bringing his false arrest claim until the charges against him were dropped because success on that claim, would necessarily have impugned the pending prosecution.

The Seventh Circuit disagreed:

> [A] claim for False arrest, insofar as it seeks damages for the arrest only, would not necessarily imply the invalidity of any future conviction or sentence. A plaintiff could succeed on a false arrest claim by demonstrating that he was arrested without probable cause (for example, by showing that the arresting officers ignored exculpatory information and arrested him with little or no basis for suspecting that he committed the crime); however, this would not demonstrate the invalidity of a future conviction for the same offense, A person can be validly convicted regardless of the quantum of evidence possessed by the police at. the time of arrest.

Id. at 899. On the strength of that distinction, the court rejected the notion that the accrual date for a section 1983

false arrest claim depends on the facts of each case and the parameters of *Heck*. Instead, the court reaffirmed its position that a claim, for false arrest accrues at the time of the arrest. *Id.*

The court's opinion in *Okoro v. Bohman*, 164 F.3d 1059 (7th Cir. 1999) does not dictate a different result. First, *Okoro*. was not a section 1983 false arrest case, but a case pursuant to Federal Rule of Criminal Procedure 41(e) seeking the return of property allegedly stolen during a. search. *Id.* at 1061. Moreover, even if it were a false arrest case, the court's statement about the application of *Heck* would be dictum, because, as the court said, the issue was not even raised by the parties. *Id.* Finally, *Okoro* was decided two years before the court reaffirmed its "categorical approach" to applying *Heck* to false arrest cases in *Snodderly*. Thus, *Okoro*, would not control this suit even if it were a false arrest case decided on the basis of *Heck*.

For all of these reasons, plaintiff's motion to alter or amend the Court's January 27, 2003 judgment order is denied.

(2)

Supreme Court, U.S.
FILED
AUG 11 2004
OFFICE OF THE CLERK

No. 03-1717

IN THE
SUPREME COURT OF THE UNITED STATES

BRODERICK JONES,

Petitioner,

v.

REGINALD WILEY

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

When a police officer fabricates the evidence used to justify an arrest, and when that fabricated evidence (1) is the basis for the post-arrest determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), (2) is the foundation for a grand jury indictment, and (3) is the underpinning for the prosecutor's decision to continue a criminal prosecution for two years,

1. Whether an action for damages under 42 U.S.C. §1983 against the police officer who fabricated the evidence must be brought before the criminal charges have been resolved in favor of the wrongfully prosecuted person?

2. Does the unreasonable seizure arising from the arrest based on fabricated evidence continue until the criminal charges have been resolved in favor of the wrongfully prosecution person or does the unreasonable seizure end when the arrestee is formally charged with an offense?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner submits the following in response to the petition for writ of certiorari filed by petitioner Broderick Jones to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 22, 2004.[1]

STATEMENT

After he had been cleared of criminal charges, respondent Reginald Wiley filed an action for money damages under 42 U.S.C. §1983 against petitioner Chicago Police Officer Broderick Jones, and his employer, the City of Chicago.[2] Respondent alleged that he had been framed for a narcotics offense by petitioner Jones, (Complaint, par. 5), that Jones had concealed respondent's innocence from the prosecutors, and had thereby caused petitioner to have been "wrongfully prosecuted."[3] (Complaint, par. 6.) The prosecution continued until July of 2002, when all charges were dismissed.[4] (Complaint, par. 7.)

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1. The arguments advanced here are equally applicable to respondent's cross-petition for writ of certiorari, *Wiley v. City of Chicago,* No. 03-1687.

2. The City of Chicago is not a party to this petition but is a respondent in the cross-petition, No. 03-1687.

3. The complaint is reproduced in the appendix to the cross-petition, No. 03-1687, Pet.App. 17-18.

4. Although the complaint does not provide any details about the nature of the dismissal, the state court criminal docket shows that respondent was found not guilty at a bench trial. *People v. Wiley,* Circuit Court of Cook County, Illinois, No. 00-CR-1-2461001.

The district judge mistakenly assumed that there had not

In addition to bringing a wrongful prosecution claim against petitioner, respondent also sought to impose liability on the City of Chicago, alleging that respondent's misconduct was possible because of the municipality's deliberate indifference to the fabrication of evidence by its police officers. (Complaint, par. 8.) Petitioner sought damages for the violation of rights secured by the Fourth and Fourteenth Amendments, as well as damages for the Illinois tort of malicious prosecution. (Complaint, par. 9.)

Respondent filed an answer to the complaint, denying any wrongdoing. The City of Chicago moved to dismiss petitioner's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing that respondent's only viable federal claim was for false arrest, and maintaining that this claim was barred by the statute of limitations because it had accrued when respondent was arrested.

Respondent argued in the district court that his claim was not for "false arrest," but was for "wrongful prosecution." (Plaintiff's Memorandum in Opposition to

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been a trial (Pet.App. 11a) and petitioner repeats this error, stating that charges against respondent were "dropped." (Pet. 2.) Respondent does not assert that undergoing a trial is an element of his cause of action and accordingly does not believe that the manner in which the charges were dismissed has any bearing on the questions presented in this case or in the cross-petition, No. 03-1687.

Motion to Dismiss, 3-6.) The district court disagreed, relying on the Seventh Circuit's decision in *Newsome v. McCabe,* 256 F.3d 747 (7th Cir. 2001) that the "effective holding" of *Albright v. Oliver,* 510 U.S. 266 (1994) (Pet.App. 11a) limited respondent's Fourth Amendment claim to one for false arrest, which was untimely because it had been filed after expiration of the statute of limitations. (Pet.App. 12a.)

In a timely motion to reconsider, respondent argued that the district court's holding was contrary to *Heck v. Humphrey,* 512 U.S. 477 (1994) because his wrongful prosecution claim arose from a police frame-up, a fact which, if accepted, would have undermined the criminal prosecution and could therefore not be brought until the criminal case had been resolved in respondent's favor. (Plaintiff's Rule 59 Motion to Amend Judgment, 2-3.) The district court refused to reconsider, applying the Seventh Circuit's "categorical approach" of *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001) that all Fourth Amendment claims accrue upon arrest. (Pet.App. 15a-16a.)

On appeal, respondent provided further details about petitioner's alleged wrongdoing,[5] stating as follows:

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5. Caselaw in the Seventh Circuit encourages appellants to "hypothesize" facts in an appeal from an order granting a Rule 12(b)(6) motion to dismiss. See, e.g., *Stevens v. Umsted,* 131 F.3d 697, 705 (7th Cir. 1997); *Chavez v. Illinois State Police,* 251 F.3d 612, 648 (7th Cir. 2001).

> For several years, Chicago police officer defendant Broderick Jones has fabricated evidence to charge citizens with drug offenses. Each bogus arrest follows a similar pattern: Jones and his partner arrest a suspected drug dealer; if a search fails to turn up any contraband, the officers plant drugs on or about the arrestee and claim that they had observed the arrestee make several drug sales. The City is aware of Jones' misconduct because he has been the subject of numerous citizen complaints about planting drugs. Plaintiff's claim of municipal liability is that officer Jones was able to engage in this wrongdoing because of the deliberate indifference of defendant City of Chicago to the fabrication of evidence by its police officers.
>
> *Wiley v. Chicago,* 7th Cir., No. 03-1490, Brief of Appellant at 3.

The Seventh Circuit rejected the district court's interpretation of *Heck v. Humphrey, supra.* (Pet.App. 2a-5a.) The Court of Appeals held, however, that respondent could not maintain a federal claim for "wrongful prosecution," (Pet.App. 5a), and concluded that respondent's Fourth Amendment claim was limited to one for false arrest. Id. The Seventh Circuit applied its decision in *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003), to hold that the damages recoverable on a false arrest claim stop when the arrestee is arraigned or formally charged. (Pet.App. 6a.) The Court of Appeals rejected respondent's reliance on the Fourth Amendment theories discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994), (Pet.App. 5), and held that respondent had waived his federal claim against the City of Chicago because he had

"failed to advance it on appeal."[6] (Pet.App. 6.) Respondent's timely petition for rehearing was denied without opinion. (Pet.App. 8.)

ARGUMENT

The petition in this case and the cross-petition in No. 03-1687 present, from opposing perspectives, questions that have divided the Courts of Appeals in applying *Albright v. Oliver*, 510 U.S. 266 (1994) and *Heck v. Humphrey*, 512 U.S. 477 (1994) to wrongful prosecutions.[7] Resolution of these questions is important both to the municipalities that are financially responsible for the wrongdoing of their police officers and to persons, like respondent, who were framed and then wrongfully prosecuted.

Petitioner argues that when a person is arrested and prosecuted after he (or she) has been framed by a police officer, the "Fourth Amendment's applicability is at an

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6. The opinion of the district court made plain that the City had not "contest[ed] plaintiff's 'policy' allegations." (Pet.App. 9a.) The ordinary rule of appellate procedure is that an appellant need not seek review of an issue that had been conceded in the lower court and it unclear how the Seventh Circuit expected this non-issue to have been "advanced" on appeal. Respondent seeks review of this novel waiver rule in his cross petition, No. 03-1687.

7. We use the phrase "wrongful prosecution" to differentiate respondent's constitutional claims from the common law torts of false arrest and malicious prosecution. See *infra* at 9-12.

end once the arrestee is charged with an offense." (Pet. 14.) In petitioner's view, a person arrested as part of a police frame-up cannot await dismissal of the bogus charges lest his (or her) claim be barred by the statute of limitations; petitioner argues that a claim for damages from a police frame-up accrues immediately upon arrest and that the victim of the frame-up must immediately file a Section 1983 action for damages "while memories are still fresh and critical witnesses and documents are still available." (Pet. 21.)

Neither of these questions has been squarely resolved by the Court.

-I-

In her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994), Justice Ginsburg suggested two ways in which the Fourth Amendment applied when a person is framed by a police officer. The first has become known as the "continuing seizure" theory, that "[a] person facing serious criminal charges is hardly freed from the state's control upon his release from a police officer's physical grip." Id. at 279 (concurring opinion). Under this theory, a person who is required to answer criminal charges that arise from a police frame-up is subjected to a "continuing seizure" until the favorable resolution of the criminal charges, when he (or she) would be entitled to seek compensation under Section 1983 for post-arrest damages.

The "continuing seizure" theory, which was endorsed by two other Members of the Court in *Albright,* 510 U.S. at 307, (Stevens, J., joined by Blackmun, J., dissenting), has been adopted without reservation by the

Fourth and Ninth Circuits,[8] and is used by the First, Third, and Eleventh Circuits as the framework for deciding whether conditions of pre-trial release constitute a seizure.[9] The "continuing seizure" theory, however, has been "repeatedly rejected" by the Seventh Circuit (Pet.App. 5a), and has been rejected in *en banc* decisions by the Fifth and Eighth Circuits.[10]

The second approach set out by Justice Ginsburg in her concurring opinion in *Albright* turns on a police officer's post-arrest actions, such as providing false information at the post-arrest judicial determination of probable cause required by *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975). If a police officer provides false evidence at a *Gerstein* hearing, "that testimony served to maintain and reinforce the unlawful haling of [the arrestee] into court, and so perpetuated the Fourth Amendment violation." 510 U.S. at 279. Liability for providing such false evidence would be consistent with *Franks v. Delaware,* 438 U.S. 154 (1978), where the

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8. *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002).

9. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Kingsland v. City of Miami,* 369 F.3d 1210, 1222 (11th Cir. 2004).

10. *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc). *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

Court held that the Fourth Amendment "would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile." Id. at 168. This is the "wrongful prosecution" theory that respondent advanced in the court below. (*Wiley v. Chicago,* 7th Cir., No. 03-1490, Brief of Appellant at 2, 5-6, 10-14.)

The injury resulting from a prosecution that is based on fabricated evidence or on a police officer's false statements may also be analyzed on a Fourteenth Amendment Due Process theory.[11] This is the approach followed in the Second, Fifth, Sixth, and Eighth Circuits, which view the injury resulting from a police frame-up as a denial of due process.[12]

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11. Respondent advanced the Due Process theory as an alternative argument in the court of appeals. (*Wiley v. Chicago,* 7th Cir., No. 03-1490, Reply Brief of Appellant at 5.) Petitioner argues in his brief in opposition in No. 03-1687 that respondent waived his due process argument by making his argument in the alternative. (Br.Opp., 03-1687, 8.) This claim of waiver is without merit: respondent neither waived nor abandoned his Due Process argument by urging the Seventh Circuit to resolve his claim on Fourth Amendment grounds. Cf. *Cline v. Kaplan,* 323 U.S. 97, 100 (1944) (objection to disposition of claim by summary procedure not waived by participating in proceedings).

12. *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000) *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Stemley v. City of Florence,* 126 F.3d 856, 872 (6th Cir. 1997), *opinion following remand,* 350 F.3d 578 (6th Cir.

A Fourth Amendment "wrongful prosecution" claim differs from the common law tort of malicious prosecution.[13] A claim for "wrongful prosecution" begins with a police officer's misconduct in fabricating evidence or making false material statements. A "wrongful prosecution" does not require active involvement by the police officer in the institution of the criminal prosecution, as would be required for the tort of malicious prosecution.[14] Nor does a "wrongful prosecution" require malice

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2003) (fabrication of evidence, acquittal, due process theory); *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc) *Cf. Pierce v. Gilchrist,* 359 F.3d 1279, 1293 (10th Cir. 2004) (fabricating evidence actionable as a "due process/fair trial deprivation" or as Fourth Amendment violation)

13. Respondent advanced this distinction in his briefs in the court of appeals and at oral argument in the court below expressly disavowed the theory that the common law tort of malicious prosecution was available in an action brought under Section 1983. (Pet.App. 6a.)

14. The six elements of malicious prosecution were set out by the Illinois Supreme Court in *Glenn v. Lawrence,* 280 Ill. 581, 585, 117 N.E. 757, 759 (1917):

    1. The commencement or continuance of an original criminal or civil judicial proceeding;

    2. Its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding;

    3. Its bona fide termination in favor of the present plaintiff;

    4. The absence of probable cause for such proceeding;

— there is no state of mind element in Section 1983 actions beyond that necessary to state a violation of the underlying constitutional right. *Parratt v. Taylor,* 451 U.S. 527, 534-45 (1981).

The Seventh Circuit stands along in holding that the victim of a wrongful prosecution is entitled to damages "limited to the harm that he incurred from the false arrest before he was charged." *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003) This is the rule that the court of appeals applied in this case. (Pet.App. 5a-6a.) In the view of the court of appeals, this rule is required because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger,* 349 F.3d at 361.

A police frame-up that results in a wrongful prosecution is different from a common law claim of false arrest. The gist of a frame-up claim is that the officer has fabricated evidence, e.g., by planting contraband or by lying about visual observations. In contrast, a false arrest claim does not require any evidence of wrongdoing; the claim is simply "that the defendant acted without having reasonable grounds to believe that an offense was committed by the plaintiff." *Meerbrey v. Marshall Field and Co., Inc.,* 139 Ill.2d 455, 474, 564 N.E.2d 1222, 1231 (1990). A frame-up claim arises from active

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5. The presence of malice therein; and

6. Damage resulting to the plaintiff.

wrongdoing by the arresting officer; a false arrest claim arises from a mistake in judgment. A judicial determination of probable cause which is not based on false material statements cures any injury that resulted from a false arrest; the same cannot be true when the judicial finding of probable cause is based on police perjury.

The damages that are proximately caused by a wrongful prosecution are different than those recoverable because of a false arrest.[15] Damages for a false arrest end when there has been a judicial determination of probable cause; damages for a wrongful prosecution would include compensation for the injury of being required to defend bogus criminal charges, as well as compensation for any imprisonment, discomfort, or injury to health, loss of time and income, deprivation of society, and loss of reputation.

The various legal theories that have been crafted in an attempt to provide a federal remedy for wrongful prosecutions have been plagued by "imperfect" analogies, *Wilson v. Garcia*, 471 U.S. 261, 272 (1985), to

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15. Petitioner, as respondent in No. 03-1687, offers the remarkable argument that respondent waived any challenge to the Seventh Circuit's limitation on damages on a wrongful prosecution claim when, in his brief in the court below, he accurately described the damages recoverable on a common law false arrest claim. (Br.Opp., No. 03-1687, 11.)

common law torts.[16] This case — taken together with the cross-petition in No. 03-1687 — provides an appropriate vehicle for the Court to adopt a clear standard for the cause of action arising from the deprivation of Fourth Amendment rights caused by a wrongful prosecution.

-II-

Petitioner's assertion that a Section 1983 action for damages caused by a police frame-up accrues upon arrest, rather than upon the favorable termination of criminal proceedings, reflects what petitioner accurately describes as the "considerable confusion," (Pet. 7), that has resulted from footnote 7 in *Heck v. Humphrey,* 512 U.S. 477 (1994).[17]

In *Heck v. Humphrey,* a convicted felon filed a Section 1983 action against the prosecutors and a police investigator, asserting that these persons had wrongfully caused his conviction. The Court held that the damages action could not proceed until and unless the conviction was set aside. The rule of *Heck v. Humphrey* is that "a

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16. Such "imperfect analogies" appear throughout the amicus brief of the City of New York (filed in No. 03-1687), where respondent's wrongful prosecution claim is repeatedly referred to as a "false arrest claim." (Brief Amicus Curiae of the City of New York, No. 03-1687, 1-3.)

17. Petitioner is mistaken in arguing (Pet. 17), that the Court resolved this confusion in *Nelson v. Campbell,* 124 S.Ct. 2117 (2004). See *infra* at 14-15.

1983 action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." 512 U.S. at 490.

Petitioner correctly points out that the lower federal courts have followed different approaches in applying *Heck* to claims brought by persons, like respondent, who were never convicted of an offense.[18] (Pet. 6-11.) These divergent approaches are the result of attempts to apply footnote 7 in *Heck*. 512 U.S. at 487 n.7

Footnote 7 in *Heck* illustrated a situation in which a Section 1983 action "even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff." (emphasis in original) The note states as follows:

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18. Petitioner correctly points out that the courts of appeals have uniformly held that *Heck* applies to "claims brought by persons facing pending criminal charges when the suit, if successful, would necessarily invalidate a potential conviction on the pending charges." (Pet. 5.) Amicus City of New York argues (in No. 03-1687) that *Heck* does not apply in cases "where the criminal charges had been dismissed without a trial." (Brief of City of New York, No. 03-1687, 5.) This case does not provide an appropriate vehicle to answer this additional question because the criminal charges against respondent were dismissed after a finding of not guilty at a trial See *ante* at 2 n.4.

> For example, a suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial resulting in the §1983 plaintiff's still-outstanding conviction. Because of doctrines like independent source and inevitable discovery, see *Murray v. United States*, 487 U.S. 533, 539 (1988), and especially harmless error, see *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991), such a §1983 action, even if successful, would not necessarily imply that the plaintiff's conviction was unlawful. In order to recover compensatory damages, however, the §1983 plaintiff must prove not only that the search was unlawful, but that it caused him actual, compensable injury, see *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 (1986), which, we hold today, does not encompass the "injury" of being convicted and imprisoned (until his conviction has been overturned).

Footnote 7 does not address the recurring fact situation presented in this case when an unlawful arrest results in a prosecution without a conviction. The result of applying footnote 7 to this scenario is, as petitioner points out (Pet. 10-12), a split among the circuits.

Petitioner is mistaken in arguing (Pet. 17) that *Nelson v. Campbell*, 124 S.Ct. 2117 (2004) resolved this conflict. *Nelson* involved a claim advanced after conviction; the Court explained that footnote 7 in *Heck* upheld the right of Section 1983 plaintiffs to being civil rights claims that would not undermine the conviction: "To hold otherwise would have cut off potentially valid damages actions as to which a plaintiff never obtain favorable termination—suits that could otherwise have gone

forward had the plaintiff not been convicted." 124 S.Ct. at 2124. Nothing in *Nelson* addresses whether a damages action must be brought when the suit, if successful, would undermine a criminal prosecution.

Notwithstanding the real conflict among the circuits about footnote 7 in *Heck*, it does not appear that any circuit would hold that a claim of police frame-up accrues before the favorable termination of the criminal prosecution.[19] As Judge Posner explained in *Robinson v. Doe*, 272 F.3d 921 (7th Cir. 2001), success on such a claim would necessarily undermine any conviction:

> The plaintiff claimed that he'd been framed; that the police who arrested him for supposedly selling heroin to them had really come to purchase not heroin but gems, which they subsequently stole from him and then fabricated the tale of his selling them heroin. The testimony of the police that they had bought heroin from the plaintiff was essential to this conviction, yet had he proved his false-arrest case the

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19. Two of the circuits which hold that Fourth Amendment claims accrue upon arrest recognize an exception for frame-up cases. *Nieves v. McSweeney*, 241 F.3d 46, 52 n.4 (1st Cir. 2001), (some "section 1983 claim[s] based on a warrantless arrest will not accrue at the time of the arrest); *Laurino v. Tate*, 220 F.3d 1213 (10th Cir. 2000) (*Beck v. City of Muskogee Police Department*, 195 F.3d 553 (10th Cir. 1999) does not apply where all the evidence to be presented was obtained as the result of an illegal arrest." 195 F.3d at 559 n. 4.)

testimony would have been completely discredited.

Robinson v. Doe, 272 F.3d at 923.

In our view, there should be a bright line rule of accrual when damages are sought against police officers on a claim of wrongful prosecution: The appropriate rule should be that the wrongful prosecution claim accrues when the criminal prosecution has been resolved in favor of the civil rights plaintiff.

CONCLUSION

The petition in this case and the cross-petition in No. 00-1687 present, from opposing perspectives, important questions that have divided the Courts of Appeals and which should be resolved by this Court.

August, 2004

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No. 03-1717

AUG 18 2004

IN THE

Supreme Court of the United States

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Petitioner,

v.

REGINALD WILEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

Supreme Court of the United States

No. 03-1717

BRODERICK JONES,

Petitioner,

v.

REGINALD WILEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

Respondent acknowledges that this case presents important and recurring questions on which the circuits have divided, and urges plenary review. Respondent, however, continues to seek plenary review of his own petition (No. 03-1687) without acknowledging the host of problems that infect that petition. Moreover, respondent understates the significance of the intervening decision of this Court in *Nelson v. Campbell*, 124 S. Ct. 2117 (2004), which, at a minimum, mandates that the court of appeals' decision be vacated and this case be remanded to that court for reconsideration.

1. Respondent acknowledges that the meaning of the decision in *Heck v. Humphrey*, 512 U.S. 477 (1994), for Fourth Amendment claims has produced "a split among the circuits." Resp. Br. 14. He also acknowledges that "the

lower federal courts have followed different approaches in applying *Heck* to claims brought by persons, like respondent, who were never convicted of an offense." *Id.* at 13 (footnote omitted). Finally, respondent acknowledges as well that the theory of "continuing seizure" that he presses has also produced a split in the circuits and is appropriately embraced in the question presented in Officer Jones's petition. See *id.* at 5-7, 16. See also Pet. 14 n.5. Nevertheless, respondent claims that "it does not appear that any circuit would hold that a claim of police frame-up accrues before the favorable termination of the criminal prosecution." Resp. Br. 15 (footnote omitted). He adds, citing *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001), and *Laurino v. Tate*, 220 F.3d 1213 (10th Cir. 2000), that "[t]wo of the circuits which hold that Fourth Amendment claims accrue upon arrest recognize an exception for frame-up cases." *Id.* at 15 n.19.

In fact, the conflict in the circuits cannot be cabined as respondent suggests. In *Nieves*, for example, the plaintiffs alleged that "the officers conspired to deprive [them] of their civil rights by using excessive force, arresting them without probable cause, initiating baseless charges, and maliciously prosecuting those charges." 241 F.3d at 49. Of these claims, the court held that they all accrued immediately upon the plaintiffs' arrest except for the claim of malicious prosecution. See *id.* at 52-53. Thus, the court held that even an alleged conspiracy to bring baseless charges—a claim indistinguishable from the Fourth Amendment claim pressed here—accrued immediately. In *Nieves*, the court held that *Heck* delays the accrual of only malicious prosecution claims; and here, respondent acknowledges that he does not make the claim of malicious prosecution that survived the statute of limitations in *Nieves*. See Resp. Br. 9-11 & n.13.[1]

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[1] To support his very different reading of *Nieves*, respondent cites the court's footnote 4. See Resp. Br. 15 n. 19. In that footnote, however, the court wrote only that "there may be rare and exotic circumstances in

As for the decision in *Laurino*, the Tenth Circuit in that case held that the plaintiff's allegation of a warrantless arrest without probable cause accrued immediately upon his arrest, and not after he was acquitted on the charges for which he was arrested. See 220 F.3d at 1216-17. Respondent endeavors to take comfort from *Laurino*'s footnote 3, which adverts not to the possibility of delayed accrual on a Fourth Amendment claim when there is an alleged "police frame-up" (Resp. Br. 15), but instead suggests that accrual may be delayed while related criminal charges are pending "where all of the evidence to be presented was obtained as the result of an illegal arrest." 220 F.3d at 1217 n.3 (citation omitted). See also *Beck v. City of Muskogee Police Department*, 195 F.3d 553, 559 n.4 (10th Cir. 1999) ("[W]e are not faced with the rare situation . . . where all evidence was obtained as a result of an illegal arrest."). But the circuits are split on whether *Heck* delays accrual even when the plaintiff alleges that all of the evidence against him on a pending criminal charge was derived from an alleged Fourth Amendment violation. In *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995) (per curiam), for example, the court held that a complaint alleging an illegal search of the plaintiff's car accrued immediately under *Heck* even though that search produced all of the evidence used to convict the plaintiff for illegally possessing a rifle recovered in the search. See *id.* at 253 & n.1. Similarly, in *Moore v. Sims*, 200 F.3d 1170 (8th Cir. 2000) (per curiam), the court held that a claim of illegal detention and search accrued immediately under *Heck* even though the plaintiff was convicted for possession of cocaine recovered during the allegedly illegal detention and search. See *id.* at 1171-72. And in *Nieves*, as we explain above, the court concluded that the plaintiffs' Fourth Amendment claims accrued immediately despite an allegation that the arresting

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which a section 1983 claim based on a warrantless arrest will not accrue at the time of the arrest." 241 F.3d at 53 n.4.

officers conspired to pursue baseless charges. See 241 F.3d at 52-53. In all of these cases, the plaintiffs' allegations, if sustained, meant that all of the evidence against them was produced by a Fourth Amendment violation, and yet in each case the court held that the plaintiffs' claims accrued immediately and not when the related criminal litigation had ended. These cases, however, cannot be reconciled with the decisions in other circuits we discuss in the petition that hold that *Heck* delays accrual whenever a Fourth Amendment claim, if successful, would require the suppression of critical evidence against an accused. See Pet. 7-12. This undeniable conflict in the circuits warrants plenary review, as even respondent ultimately acknowledges. See Resp. Br. 16.

2. Respondent argues that his claim did not accrue while related criminal charges were pending because "a claim of police frame-up," in respondent's view, would "necessarily undermine any conviction." Resp. Br. 15. But this is no different from the rule that *Heck* rejected, which would have barred any action seeking damages that "would resolve a necessary element to a likely challenge to a conviction . . . ." 512 U.S. at 488. As we explain in our petition, *Heck* delays accrual only when favorable termination of related criminal litigation is an element of the civil cause of action at issue, and a favorable termination of a related criminal case is never an element of a Fourth Amendment claim alleging arrest without probable cause. See Pet. 12-13.

Moreover, whatever the merits of respondent's interpretation of *Heck*, it provides no support for the holding of the court of appeals in this case. Under the court of appeals' holding, the claim that respondent can advance permits him to recover damages only between the time of his arrest and the time that he was arraigned on charges. See Pet. App. 6a. Thus, success on that claim would not necessarily establish the invalidity of the charges that were filed against respondent or of a potential conviction on those charges—the

claim that the court of appeals has permitted respondent to make simply does not embrace the course of respondent's prosecution in state court. There is accordingly no necessary inconsistency between the charges that were filed against respondent and the false arrest claim that the court of appeals wrongly held did not accrue until the charges against respondent had been resolved in his favor.[2]

In an effort to make his claim seem dependent on the course of the criminal proceedings against him, respondent denies that his claim is for false arrest and instead characterizes his Fourth Amendment claim as one for "wrongful prosecution." Resp. Br. 9-12. But there is no such thing as a Fourth Amendment "wrongful prosecution" claim. The Fourth Amendment is directed at "unreasonable searches and seizures," U.S. Const. amend. IV, not prosecutions. Indeed, it has long been settled that an arrestee has no right under the Fourth Amendment "to judicial oversight or review of the decision to prosecute." *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975). Moreover, even if respondent were correct that an arrestee can recover damages for a prosecution undertaken as a consequence of a baseless arrest despite the Seventh Circuit's holding to the contrary (Resp. Br. 11), the fact that a plaintiff's damages continue to mount while the charges against him remain pending is no reason to delay accrual of his cause of action. It is well settled that a cause of action accrues when the plaintiff learns his rights have been

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[2] Respondent faults us for stating that the charges against him had been dropped when respondent now claims to have been found not guilty at a bench trial. See Resp. Br. 1-2 n.4. In fact, the petition accurately describes the allegations in respondent's complaint, which alleged that the charges against respondent were dropped on July 8, 2002. R. 1 ¶ 7. Apparently, respondent's complaint did not accurately describe the disposition of the criminal case against him. In any event, we agree with respondent that the precise manner in which the criminal case against respondent was terminated is of no legal significance to respondent's constitutional claims. See Resp. Br. 1-2 n.4.

violated, and not when the full consequences of that violation are felt. See, *e.g.*, *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981) (per curiam); *Delaware State Teachers College v. Ricks*, 449 U.S. 250, 258 (1980).

Respondent also fails to come to grips with the import of *Nelson*. Respondent claims that *Nelson* does not address "whether a damages action must be brought when the suit, if successful, would undermine a criminal prosecution." Resp. Br. 15. *Nelson* however, explicates the favorable termination requirement of *Heck*, and teaches that this requirement applies only when plaintiffs "challenge the fact or duration of their confinement without complying with the procedural limitations of the federal habeas statute," and does not "cut off potentially valid damages actions . . . that could otherwise have gone forward had the plaintiff not been convicted." 124 S. Ct. at 2124. Thus, under *Nelson*, *Heck*'s favorable termination requirement did not delay the accrual of respondent's Fourth Amendment claim. That claim did not challenge the fact or duration of respondent's confinement, nor was it in any way dependent upon respondent's prosecution or conviction. Had Officer Jones released respondent after his allegedly baseless arrest without charges, respondent could immediately have brought a Fourth Amendment claim against Officer Jones, and as *Nelson* makes plain, *Heck* does not "require differential treatment of [an] otherwise cognizable § 1983 claim." *Id.* at 2125. Accordingly, even if the Court denies plenary review in this case, vacatur of the judgment of the court of appeals and a remand to that court for reconsideration in light of *Nelson* is surely warranted.

3. Respondent appears to agree that Officer Jones's petition for a writ of certiorari should be granted, but he argues that his own petition should be granted as well. See Resp. Br. 5, 16. In our brief opposing that petition, however, we explain that respondent's petition (No. 03-1687) raises a number of issues on which there is no conflict in the circuits

and which do not merit plenary review, and the petition is plagued by waiver problems as well. Respondent ignores most of this discussion and confines himself to two observations about his petition.

First, respondent claims that he did not abandon his claim under the Due Process Clause but merely "urge[d] the Seventh Circuit to resolve his claim on Fourth Amendment grounds." Resp. Br. 8 n.11. As we explain in our brief in opposition, however, respondent did more than merely urge multiple theories of liability. Instead, he argued that because his claim was subject to the Fourth Amendment, it would be inappropriate to analyze it under the rubric of due process as well. See Brief for Respondents in Opposition at 8, No. 83-1687. On that score, respondent was correct—in *Albright v. Oliver*, 510 U.S. 266 (1994), a majority of the Court concluded that when an action seeking damages for an allegedly wrongful prosecution describes an unreasonable search or seizure within the meaning of the Fourth Amendment, no alternate theory of liability under the Due Process Clause should be entertained. See *id.* at 274 (plurality opinion); *id.* at 290-91 (Souter, J., concurring in the judgment).

Second, respondent claims that he did not waive below an attack on the Seventh Circuit's limitation on the damages recoverable on a Fourth Amendment claim but merely filed a brief that "accurately described the damages recoverable on a common law false arrest claim." Resp. Br. 11 n.15. Respondent, however, is unable to identify any point in his briefs or argument below in which he advanced the view of Fourth Amendment damages reflected in his own petition for certiorari.

Officer Jones's petition supplies an appropriate vehicle to examine both the application of *Heck* to Fourth Amendment claims as well as the theory of "continuing seizure" that respondent presses. Both of these issues have divided the

circuits, and, as respondent acknowledges, they are both embraced within the question presented in Officer Jones's petition. Respondent's own petition for certiorari, on the other hand, injects additional issues into the case that do not merit plenary review. Thus, while the parties are in agreement that this petition for a writ of certiorari should be granted, there is no reason to inject additional complexity and confusion into this case by granting respondent's petition as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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